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No. 93-1764

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ARTHUR TAKEALL,
Petitioner,

v.

PEPSICO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT PEPSICO, INC.

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Can a copyright infringement plaintiff who fails to come forward with evidence showing a reasonable possibility of access to his work by the persons responsible for creating the allegedly infringing work rely solely on assumed "striking similarity" between the plaintiff's and defendant's works in order to survive a motion for summary judgment?

PARTIES

Petitioner Arthur Takeall is an individual residing in the State of Maryland.

Defendant PepsiCo, Inc. is a corporation organized under the laws of the State of North Carolina with its principal place of business in the State of New York. A complete list of PepsiCo, Inc.'s significant subsidiaries as required to be disclosed under Item 601 of Regulation S-K promulgated under the Securities Act of 1933 and the Securities Exchange Act of 1934 appears in the Appendix to this brief.

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BRIEF IN OPPOSITION OF RESPONDENT PEPSICO, INC.

Respondent PepsiCo, Inc., respectfully requests that the Petition for a Writ of Certiorari filed by petitioner Arthur Takeall be denied.

STATEMENT OF THE CASE

Petitioner Arthur Takeall ("Takeall") is a little-known ventriloquist who claims that he used in his act a line made famous by Ray Charles in a series of popular television commercials for Diet Pepsi—"You Got the Right One, Baby, Uh Huh." Takeall's contention in this lawsuit is that respondent PepsiCo., Inc. ("PepsiCo") copied that line from his ventriloquist act and incorporated it into the Diet Pepsi commercials without his permission.

Takeall's ventriloquist act consists solely of a spoken monologue interspersed with dialogue with his dummy

"Scooter" and the audience. It does not include music, lyrics or other accompaniment.

Takeall claimed that he first started using "Uh Huh" during his career as a disc jockey in the 1960's. His radio appearances as a disc jockey continued throughout the 1970's, during which time Takeall allegedly continued to use "Uh Huh" as a tag line. Over the course of that radio career, Takeall worked as a disc jockey in 25 stations in 12 states.

Other than his own uncorroborated testimony, no evidence was adduced by Takeall that he ever used the phrase "You Got the Right One, Uh Huh" during his career as a disc jockey. By his own admission, he could not have done so given the fact that his radio career ended in 1977, and he testified that he did not add the phrase to his act until 1984. He later confirmed that date in his copyright registration for the "words and narration" of his ventriloquist act. In the registration application, he stated that the version of his ventriloquist act for which registration was sought was created in 1984.

In 1977, Takeall became a stand-up performer in Las Vegas, Nevada. He and "Scooter" regularly performed a ventriloquist act in nightclubs and hotels in that city from 1977 to 1983.

In 1984, Takeall performed his ventriloquist act at the New Orleans World's Fair. There a press release was issued making reference to his use of the phrase "You Got the Right One, Uh-Huh."

From 1984 to the present, Takeall appeared almost exclusively at elementary schools and Job Corps centers across the country where the audience consisted of underpriviliged minority youths. No evidence exists to demonstrate that the audience for Takeall's ventriloquist act ever extended beyond elementary school children and Job Corp youths from 1984 to the present. Takeall made one appearance on the Christian Broadcasting Network's 700 Club, but the tape of that program does not show him

using the disputed phrase. In fact, the earliest videotape showing Takeall using the phrase "You Got the Right One, Uh, Huh" was created in December 1991, nearly a year after the Ray Charles commercials for Diet Pepsi first aired.

Takeall alleged that he made three attempts to market his ventriloquist act to PepsiCo during the two-year period from 1988-1989. The first overture was allegedly made to an Albany, Georgia franchisee of KFC Corporation, a PepsiCo subsidiary, by the name of Brady Keys. Without an appointment with Keys and with no prior acquaintance with him, Takeall traveled in late 1988 from his residence in Maryland to Georgia, where he allegedly delivered a "promotional package" to an unidentified person in Keys' office. Takeall never saw or spoke with Keys. In that "promotional package," he allegedly invited KFC Corporation to sponsor a "Say No to Drugs" ventriloquist tour.[1] The only document in the package containing the phrase "You Got the Right One, Uh Huh" was the 1984 New Orleans World's Fair press release. Keys denied ever receiving this alleged proposal. He further denied ever forwarding it or communicating its contents to PepsiCo or its advertising agency. Takeall never received a response to this alleged submission.

Takeall's next overture was allegedly to make a similar proposal in early 1989 to the then-Director of Affirmative Action, Barry Johnson, at Pizza Hut Corporation, which is also a PepsiCo subsidiary.[2] None of the materials accompanying Takeall's proposal contained any reference to the phrase "You Got the Right One, Uh-Huh." Johnson did not recall receiving such a proposal, and believed that he did not forward it on to Pepsi or its advertising agency.

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[1] Takeall failed to produce a copy of this alleged "promotional package" during discovery in this case.

[2] Takeall did not retain a copy of this alleged submission.

Takeall's third and final attempt to obtain PepsiCo sponsorship of a "Say No to Drugs" tour allegedly occurred on June 27, 1989, when he claimed he mailed a "promotional package" to Pepsi-Cola Company's ("Pepsi") regional office in Baltimore. The package was supposedly a response to a Pepsi advertisement in *Black Enterprise* magazine seeking applicants for its Minority Business Enterprise Program, which affords minorities the opportunity to supply goods and services to Pepsi. That advertisement, however, expressly instructed interested parties to submit proposals directly to a specific Pepsi official located at its headquarters in Somers, New York.

According to Takeall, his submission to Pepsi requested sponsorship of a national "Drug Free Project" tour in Job Corps centers. Takeall's submission allegedly included two letters referring to the phrase "You Got the Right One, Uh-Huh." One of those letters, which Takeall claimed he mailed to himself to verify the fact of his submission, was proven by PepsiCo not to be authentic because the paper on which the copy was made was not manufactured until April 1990, nearly a year later.

Pepsi Baltimore had no record of ever receiving a proposal from Takeall. Its then-marketing director testified that it was not her practice to forward any proposals she may have received to PepsiCo or Pepsi headquarters. Takeall never received any response to his alleged proposal.

In an effort to substantiate Pepsi's receipt of his alleged submission, Takeall claimed that he later received from Pepsi an unsolicited copy of the rules for a "You Got the Right One, Baby, Uh Huh" contest in which the public could submit renditions of the jingle for possible inclusion in a Diet Pepsi television commercial. Takeall asserted tnat his receipt of this unsolicited copy of the rules showed that Pepsi had received his package and had his name and address on file. This claim was shown to be a fabrication when telephone records established that Takeall himself had called to request a copy of the rules.

In January 1991, PepsiCo launched a major new television advertising campaign during the broadcast of the Super Bowl. The now familiar campaign featured legendary performer Ray Charles, accompanied by the "Uh Huh" female vocalists, singing "You Got the Right One, Baby, Uh Uuh" in Diet Pepsi commercials. The distinctive beloved style of Ray Charles and the elaborate staging of the commercials produced an enthusiastic response from consumers and critics alike to the television commercials, which were created and produced by PepsiCo's advertising agency, BBDO.

The Ray Charles commercials were part of an evolving advertising campaign that had its roots in a decision in late 1988, long before Takeall's alleged submission to Pepsi Baltimore, to use the phrase "The Right One" as a tag line. This phrase was conceived in an effort to preempt competitor Coca-Cola Company from using "The Real One" in its Diet Coke commercials.

The first Diet Pepsi television commercial featuring "The Right One" was broadcast on July 4, 1989. It was followed by five others in which a variety of celebrities appeared, including Ray Charles, who performed in a "The Right One" commercial entitled "The Switch." During the recording session for that commercial, BBDO Creative Director Al Merrin suggested to Ray Charles that he depart from the portion of the script calling for him to sing "Now you are singing my tune," and instead end the commercial with "Now that's the Right One, Baby."

Ray Charles' distinctive delivery of that line prompted Merrin to decide to create a jingle based on it in collaboration with Peter Cofield, a freelance composer. In September, 1990, Merrin and Cofield together created the "You Got the Right One, Baby, Uh Huh" jingle (which they called "Ray's Song"), with Cofield writing the music. Four months later in January 1991, the jingle was introduced by Ray Charles to millions of Americans during the Super Bowl.

Merrin and Cofield denied ever hearing of Takeall or his alleged proposals. They testified that they created the Ray Charles commercials independently without input or suggestions from any outside party.

On January 29, 1992, Takeall applied for a copyright registration for a version of his ventriloquist act that included the phrase "You Got the Right One, Uh Huh." On his application, Takeall stated that his ventriloquist act incorporating that line was created in 1984. In his identification of the nature of the authorship, Takeall claimed a copyright only in the "words and narration" of his act as recorded in a videotape created for the purpose of registration, which consisted of a long colloquy between Takeall and his dummy "Scooter." No copyright was claimed or registered in any musical or audiovisual elements of Takeall's act, which in any event did not include singing or music.

On March 17, 1992, Takeall filed suit against PepsiCo seeking damages for copyright infringement, "reverse confusion and passing off," breach of contract, unjust enrichment and unfair competition. In a memorandum opinion and judgment order dated December 23, 1992, the district court granted summary judgment in favor of PepsiCo on all counts.

On the copyright infringement claim, the district court found that Takeall had failed to produce evidence showing a reasonable possibility of access to his work by the persons responsible for creating the Ray Charles commercials, Merrin and Cofield. The court found that Takeall's ventriloquist act had not been so widely disseminated as to support an inference that the creators of the Ray Charles commercials had access to it. A22.[3] The court further ruled that the alleged submission of proposals to two Pepsi-affiliated companies and to Pepsi Baltimore was in-

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[3] Reference is made throughout this brief to the Appendix included with Takeall's petition.

sufficient to meet petitioner's burden under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A23-24. The court found there was no evidence that the alleged recipients of Takeall's proposals had ever communicated them to the creative people responsible for developing the television commercials. A24. The court also rejected the testimony of plaintiff's advertising expert as consisting solely of conjecture. A25.

The district court declined to decide whether the disputed phrase was protectable under copyright, or whether the Ray Charles commercials were "strikingly similar" to Takeall's ventriloquist act. Instead the court merely assumed, for purposes of deciding PepsiCo's summary judgment motion, that the phrase was copyrightable, and that the plaintiff's and defendant's works were strikingly similar.[4]

The Fourth Circuit affirmed in a *per curiam*, unpublished decision. The affirmance was based on two independent grounds. First, the court of appeals held that the district court properly required Takeall to show a reasonable possibility of access "despite the assumption of striking similarity." A9. The court further upheld the district court's finding that Takeall had failed to satisfy this standard, noting that "[t]he record reflects no evidence before the trial court establishing access on the part of the alleged copiers." A12.

In arriving at this conclusion, the Fourth Circuit agreed that Takeall's ventriloquist act had not been widely disseminated. A10. The court pointed out that "there was no evidence before the district judge to show that Takeall at any time used the disputed phrase during these performances [before alleged "millions" of listeners]." A10.

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[4] Since the only similarity alleged consisted of the disputed phrase itself, the district court's assumption of striking similarity was based upon the occurrence of that phrase (or a close derivative thereof) in both petitioner's ventriloquist act and the Diet Pepsi commercials.

The court of appeals ruled that the alleged receipt by Pepsi affiliates and Pepsi Baltimore of a package containing the disputed phrase was insufficient to prove a reasonable possibility of access by the creators of the Ray Charles commercials. The court agreed with the Eighth Circuit that access could be shown through these intermediaries only "where there is a relationship linking the intermediary [here an employee of Pepsi Baltimore] and the alleged copier." A11, *quoting Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 942 (8th Cir. 1992), *quoting Meta-Film Assoc., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1357 (C.D. Cal. 1984). No evidence of such a relationship was present in the record.

In its opinion, the court of appeals declined to adopt a *per se* rule that proof of access is unnecessary in cases involving "striking similarity." A8-9. Relying in part on the Second Circuit's ruling in *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988), the Fourth Circuit stated: "Even assuming, as did the district court, that this is a case of striking similarity, in our view, such a *per se* rule is inadvisable and unsupported by law." A9.

The second ground for the court of appeal's affirmance was its determination that "the disputed phrase fails to evince the requisite degree of originality to entitle it to copyright protection and is a short expression of the sort that courts have uniformly held uncopyrightable." A15.

Circuit Judge Niemeyer dissented because he believed that the case should not have been decided by summary judgment. Acknowledging that Takeall's case was "a thinly supported one," Judge Niemeyer nevertheless concluded that a genuine issue of material fact existed based on the record. A15.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH PRECEDENT IN OTHER CIRCUITS UNIFORMLY REQUIRING A COPYRIGHT INFRINGEMENT PLAINTIFF TO DEMONSTRATE A REASONABLE POSSIBILITY OF ACCESS

As this Court recently reaffirmed, two elements must be proven in order to prevail on a claim of copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). In the vast majority of cases, including this one, direct evidence of copying does not exist. In recognition of that reality, the federal courts have permitted infringement to be shown through circumstantial evidence of copying of protectable subject matter. *See* 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (hereafter "*Nimmer*") § 13.02, pp. 13-10 - 13-12 (1993).

As the Seventh Circuit has observed, "the most important component of this sort of circumstantial evidence is proof of access" by the persons responsible for creating the allegedly infringing work. *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984). Once access is shown, the plaintiff must further prove that the works are sufficiently similar to indicate that copying has in fact occurred—what Professor Alan Latman has called "probative similarity."[5] If access and probative similarity are shown, copying may be inferred. At that point, the inquiry shifts to whether *actionable* copying, often referred to as "improper appropriation," has occurred. *See Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946). That requires a determination whether "the allegedly infringing material bears a substantial similarity to copyrightable

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[5] *See* Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 Colum. L. Rev. 1187 (1990).

elements of plaintiff's work." *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992).

In this case, the court of appeals agreed with the district court that petitioner must show a reasonable possibility of access even assuming striking similarity. A9. No decision by any other federal appellate court is in conflict with this view. In fact, every other court of appeals that has addressed the question has arrived at the same conclusion. *See, e.g., Moore v. Columbia Pictures Indus. Inc.*, 972 F.2d 939 (8th Cir. 1992); *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984); *Ferguson v. Nat'l Broadcasting Co., Inc.*, 584 F.2d 111 (5th Cir. 1978). The lower courts are in accord on the fundamental principle that the "bare possibility" of access is insufficient to carry a plaintiff's burden of proof. *Moore*, 972 F.2d at 944; *Gaste*, 863 F.2d at 1066. *See also Nimmer*, § 13.02[A], p. 13-19. It is black-letter copyright law that access may not be established on the basis of speculation or conjecture. *Gaste*, 863 F.2d at 1066; *Ferguson*, 584 F.2d at 113.

Petitioner's central contention is that the decision of the court below conflicts with the Second Circuit's ruling in *Gaste*. This purported conflict is nowhere evident in the Fourth Circuit's opinion and is wholly contrived.

In *Gaste*, the Second Circuit upheld a jury verdict holding the composer and publisher of the popular song "Feelings" liable for copyright infringement. In so doing, the court reaffirmed that "[i]n the context of copyright, it is well established that there must be evidence of a reasonable possibility of access." 863 F.2d at 1066. The court went on to discuss the evidence in the case that was sufficient, in the court's view, for the jury to infer access through a third party connected to both the plaintiff and one of the defendants.[6]

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[6] The plaintiff's theory of access was that Kaiserman, the defendant music publisher, obtained a copy of the plaintiff's song from an intermediary (Lebendiger), with whom Kaiserman had a contractual relationship. 863 F.2d at 1066. Acknowledging that this theory of access "relies on a somewhat attentuated chain of events

Petitioner argues that the jury instruction upheld by the Second Circuit in *Gaste* demonstrates "a disparity of treatment" between litigants in the Second and Fourth Circuits. A8-9. The Fourth Circuit itself does not share this view.[7] It found no support in *Gaste* or elsewhere for "a *per se* rule regarding the elimination of the need for proof of access in cases involving 'striking similarity.'" A8-9. And far from expressing disagreement with *Gaste*, the Fourth Circuit relied upon the Second Circuit's opinion in that case for its recognition of "the limitations of the inference raised by striking similarity":

> Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation.

A9, *quoting*, *Gaste*, 863 F.2d at 1068. Indeed, the court below went on to apply what it called the "reduced standard" in *Gaste* to uphold the district court's requirement that a showing of a reasonable possibility of access must be made even assuming striking similarity. A9. Thus the Fourth Circuit plainly viewed its decision as supportable under the precedent established in *Gaste*.[8]

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extending over a long period of time and distance," the court nevertheless held that the jury could have reasonably concluded that defendant Kaiserman had access to plaintiff's song through the intermediary Lebendiger. 863 F.2d at 1067.

[7] If the Fourth Circuit believed that its decision conflicted with that of another circuit court, it is highly doubtful that it would have issued an unpublished *per curiam* decision. Indeed, it is noteworthy in this regard that the Fourth Circuit denied petitioner's motion for publication of its decision based on his contention that it conflicted with the Second Circuit's ruling in *Gaste*. The Fourth Circuit also denied petitioner's petition for rehearing with suggestion for rehearing en banc. According to an order denying that petition on January 5, 1994, not a single member of the court requested a poll on the suggestion for rehearing en banc.

[8] The district court also read both *Selle* and *Gaste* as requiring "some other circumstantial evidence establishing a reasonable pos-

Nowhere in the district court or Fourth Circuit opinions in this case did either court suggest that its approach to the access question was in conflict with the Second Circuit's decision n *Gaste*. Thus the suggestion that the Second and Fourth Circuits are in conflict on this question is spurious. The most that can be said, as the court below observed, is that the Second Circuit has adopted a "reduced standard" of access in cases of striking similarity. A9. Even under that standard, however, the Second Circuit is in fundamental agreement with the requirement uniformly adhered to that "there must be evidence of a reasonable possibility of access." *Gaste*, 863 F.2d at 1066.

It bears emphasis that *Gaste* was *not* a case, as is this one, in which the plaintiff attempted to rely solely on striking similarity as proof of access. As noted above, the plaintiff in *Gaste* provided proof demonstrating a reasonable possibility of access to his work based on a working relationship between one of the defendants and an intermediary who had obtained a copy of plaintiff's song. *Gaste*, 863 F.2d at 1066-67. No such evidence was presented by petitioner in this case.

Petitioner seeks to manufacture a conflict among the circuit courts based upon the language of the instruction given to the jury by the district court in *Gaste*. Pet. 8-9. That jury instruction alone cannot bear the weight of this reliance. The district court in *Gaste* charged the jury that it could find access based on striking similarity in the context of a record that contained sufficient evidence to enable the jury to draw such an inference. Had that evidence of access through an intermediary not existed, there is no reason to believe that the plaintiff in *Gaste* would ever have been permitted to present his case to a jury. Thus the facts in *Gaste* undermine petitioner's contention that the case stands for the proposition that a copyright infringement plaintiff can get to the jury based on assumed

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sibility of access." A22, *citing Selle*, 741 F.2d at 901; *Gaste*, 863 F.2d at 1067-68.

striking similarity in the absence of other evidence sufficient to show a reasonable possibility of access.

Petitioner further argues that the Fourth Circuit's treatment of striking similarity in this case cannot be reconciled with the Seventh Circuit's decision to *Selle* and the district court's decision in *Evans v. Wallace Berrie & Co., Inc.*, 681 F. Supp. 813 (S.D. Fla. 1988). Again the purported conflict is nonexistent. In *Selle*, the Seventh Circuit upheld a grant of a motion for judgment notwithstanding the verdict because the plaintiff failed to present evidence showing a reasonable possibility of access. 741 F.2d at 903. The plaintiff in that case failed to adduce any evidence of access, and instead attempted to prove access solely on the basis of alleged striking similarity between the plaintiff's and defendant's works. 741 F.2d at 901. The Seventh Circuit refused to permit access to be inferred solely on the basis of striking similarity, explaining that to do otherwise would conflict with the fundamental copyright principle that similarities not due to copying cannot give rise to liability for copyright infringement. In the words of the Seventh Circuit:

> [T]wo works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copies from a common source in the public domain, then there is no infringement. *Selle*, 741 F.2d at 901.

The Seventh Circuit went on to articulate a guiding principle uniformly followed by other courts in subsequent cases:

> [S]triking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access. *Selle*, 741 F.2d at 901.

This is precisely the approach laid out by the district court in the charge to the jury upheld in *Gaste*. As the Second Circuit emphasized, "Judge Conner did tell the

jurors several times . . . that they could find access only if [defendant] Kaiserman had a 'reasonable opportunity' to see or hear "Pour Toi." *Gaste*, 863 F.2d at 1067. The Second Circuit believed that this instruction was fully compatible with the earlier views expressed by the Seventh Circuit in *Selle*.

Petitioner fails to explain in what respects the Seventh Circuit's decision in *Selle* can be said to be in conflict with the Fourth Circuit's decision in this case. Pet. 12. All petitioner does is provide a long quote from the *Selle* decision that so resembles the approach taken by the court below that the quoted passage could fit comfortably in its opinion. Pet. 12. The Fourth Circuit itself actually relied upon *Selle* to support its conclusion that striking similarity must be accompanied by "some other circumstantial evidence establishing a reasonable possibility of access." A22, *citing Selle*, 741 F.2d at 901. *See* W. Patry, *Latman's The Copyright Law*, 195 (6th ed. 1986) ("A finding of striking similarity is not . . . a complete substitute for proof of access.").

Nor can the district court decision in *Evans* be read to conflict with the Fourth Circuit's ruling in this case. In *Evans*, the district court granted summary judgment in favor of a copyright infringement defendant for the same reason found to warrant summary judgment in this case: failure of the plaintiff "to come forward with 'specific facts showing that there is a genuine issue for trial' " on the issue of access. 681 F. Supp. at 817. The court required the plaintiff to show "a reasonable possibility of access," and held that a bald (and unconvincing) assertion of "striking similarity," unaccompanied by any other evidence tending to show access, was insufficient to meet this burden. 681 F. Supp. at 816, 818. Again, this is precisely the analysis applied by the district and appellate courts in this case.

II. THIS IS AN INAPPROPRIATE CASE IN WHICH TO RESOLVE A PURPORTED CONFLICT IN THE COURTS OVER STRIKING SIMILARITY" BECAUSE THE DISTRICT COURT MADE NO FINDING OF STRIKING SIMILARITY

Even assuming that the Second Circuit's decision in *Gaste* can be read to conflict with the decision of the court below, this Court should decline to grant certiorari in this case because no finding of "striking similarity" was made by the dstrict court. As a result, a conflict over the relationship between striking similarity and access is not squarely presented in this case.

For purposes of ruling on PepsiCo's motion for summary judgment, the district court merely assumed striking similarity between Takeall's ventriloquist act and the Diet Pepsi commercials featuring Ray Charles. A22. No *finding* of striking similarity was ever made by the district court; indeed, it never made any finding that the works were similar at all.

This is, therefore, not a "striking similarity" case, despite Takeall's emphasis on that proposition. In the absence of any finding of striking similarity, it would be inappropriate to address in the context of this case a purported conflict in the courts over whether striking similarity alone can provide the basis for inferring access.

That is especially so since the only actionable similarity between Takeall's ventriloquist act and the Ray Charles Diet Pepsi commercials is the occurrence in both of a single six-word phrase: "You Got the Right One, Uh Huh." While Takeall alleges in his petition that the similarities extended beyond the words to "voice inflections" (Pet. 8), "timing," "rhythm," "gestures," and "call and response" techniques (Pet. 10-11), these aspects of his act are not protectable under copyright. None of these elements were covered by Takeall's copyright registration. in which he described the nature of the work to be registered as consisting only of "words and narration." Fur-

ther, the natural rhythms of human speech and the characteristics of the human voice are not copyrightable. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 112 S. Ct. 1513 (1992). In the "Gettysburg Address" case, the Second Circuit rebuffed a plaintiff's claim of copyright protection in the rhythm of Lincoln's words as set to music:

> [A]ny similarities of rhythm which are plainly attributable to the words and phrases of the common "lyric" [the Gettysburg Address] constitute no indication whatever of improper copying or wrongful appropriation. For just as the text of the address is in the public domain so is the natural rhythm of the words in which its thoughts are articulated.

O'Brien v. Thall, 283 F.2d 741, 743 (2d Cir. 1960).[9]

Finally, this case does not squarely present an issue of striking similarity because the two works in question simply cannot be found by any reasonable fact-finder to be strikingly similar. *Cf. Heim v. Universal Pictures Co.*, 154 F.2d 480, 488 (2d Cir. 1946) (striking similarity when "a single brief phrase, contained in both pieces, was so idiosyncratic in its treatment as to preclude coincidence.") As discussed above, striking similarity means that the similarities between the works considered as a whole are of such a nature and extend to such detail as to preclude any possibility that the works were independently created or that the similarities arose by coincidence. *Selle*, 741 F.2d at 904 (citing cases). Here the only similarity consists of a pedestrian six-word phrase, and credible evidence of independent creation was presented by PepsiCo. In this setting, striking similarity has no relevance or applicability.

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[9] "Call and response" technique, which entertainers have used for centuries to involve the audience in their performances, is clearly not subject to copyright protection. 17 U.S.C. § 102(b) (1988).

III. THIS CASE IS MERELY AN APPLICATION OF THIS COURT'S TEACHING IN *ANDERSON v. LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986) AND *CELOTEX CORP. v. CATRETT*, 477 U.S. 317 (1986), AND AS SUCH PRESENTS NO CONSTITUTIONAL ISSUE UNDER THE SEVENTH AMENDMENT

Petitioner claims that the Fourth Circuit's affirmance of the district court's summary judgment ruling has deprived him of his Seventh Amendment right to trial by jury. Pet. 13-14. This contention is frivolous.

Petitioner has no right to a jury trial unless there is a genuine issue of material fact in dispute. It is the proper role of the district court judge under Fed. R. Civ. P. 56(e) to determine "whether there is the need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If, in response to a motion for summary judgment, the nonmoving party, after the close of discovery, fails to designate "specific facts showing that there is a genuine issue for trial" as required by Rule 56(e), the grant of that motion does not deprive the nonmoving party of any Seventh Amendment right.

This case simply presents an example of the application of this Court's teaching in *Anderson* and *Celotex* to a particular set of facts. *See also McGaughey v. Twentieth Century Fox Television*, 12 F.3d 62 (5th Cir. 1994) (upholding grant of summary judgment to copyright infringement defendant because of lack of credible evidence of access). Both the district and appellate courts in this case accurately stated the standards for granting a motion for summary judgment under Rule 56 and the precedents established by this court in *Anderson* and *Celotex*. A5, 20. The district court proceeded to draw all inferences in favor of Takeall, but concluded that "the plaintiff has produced no evidence from which a reasonable fact-finder

could find, by a preponderance of the evidence, that the creators of the Pepsi jingle had direct or indirect access to Takeall's phrase . . . ." A24. The Fourth Circuit carefully evaluated this conclusion in light of the standards established in *Anderson* and *Celotex* and found no error. A5, A15.

Petitioner obviously disagrees with the application of well-settled summary judgment principles to the facts of this case. This disagreement is predicated on petitioner's assertion that he was not given the benefit, as the nonmoving party, of all inferences fairly drawn from the evidence.

No issue of constitutional dimension or of significance to the law governing dispositions of summary judgment motions under Rule 56 arises from petitioner's disagreement with the lower courts' evaluation of the evidence. Petitioner in effect invites this Court to hold that conjecture and speculation having no evidentiary basis are sufficient to require submission of the case to the jury. This Court rejected that invitation in *Anderson* when it ruled that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient . . . ." *Anderson*, 477 U.S. at 248. It should decline the invitation to revisit that issue in the context of this case.

IV. NO QUESTION OF GENERAL IMPORTANCE IS PRESENTED BY THE FOURTH CIRCUIT'S DETERMINATION THAT THE DISPUTED PHRASE IS NOT COPYRIGHTABLE

Petitioner mistakenly characterizes the lower court's ruling on the protectability of the disputed phrase as "dicta." Pet. 6. In fact, the Fourth Circuit's determination that the disputed phrase is not entitled to copyright protection is a separate, wholly independent ground for affirming the district court's decision. A14-15. The existence of this independent basis for affirmance negates the relevance in this case of any purported conflict among

the courts of appeals regarding the relationship between striking similarity and access. If the disputed phrase is not copyrightable, as the Fourth Circuit held, the degree of similarity is immaterial.

Petitioner suggests in his "reserved" third question presented that the Fourth Circuit's ruling on the threshold question of copyrightability is flawed because it failed to find that the district court's "decision" on that question was "clearly erroneous," and because respondent had not filed a cross-appeal of that "decision." Pet. i. This entire argument is a non sequitur.

Although PepsiCo argued in its summary judgment motion that the disputed phrase lacks the originality necessary to entitle it to protection under copyright, the district court simply sidestepped the issue. Recognizing the "sound authority" supporting the proposition that short or commonplace expressions are not copyrightable,[10] the district court nevertheless stated that it was "not prepared to hold, on summary judgment, that the phrase at issue so lacks originality as to be unworthy of copyright protection." A20-21. Accordingly, solely for purposes of the summary judgment motion, the court assumed that the disputed phrase was copyrightable. A21.

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[10] *See, e.g., Narrell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) ("staggering network," "crawling with alligators," "mosquitos ravished his flesh"); *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1971) ("most personal sort of deodorant"); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (("i wuv you" and "I miss you already . . . and You Haven't even Left"); *Nikas v. Vietnam Veterans of America, Inc.*, 1992 Copyr. L. Dec. (CCH) ¶ 27,031 (D.D.C. 1992) ("Standing Tall Together"); *Magic Marketing, Inc. v. Mailing Services of Pittsburgh*, 634 F. Supp. 769, 772 (W.D. Pa. 1986) ("PRIORITY MESSAGE: CONTENTS REQUIRE IMMEDIATE ATTENTION"); *Perma Greetings, Inc. v. Russ Berrie & Co.*, 598 F. Supp. 445, 448-49 (E.D. Mo. 1984) ("Hang in there" and "Along the way take time to smell the flowers"); *Laskowitz v. Marie Designer, Inc.*, 119 F. Supp. 541 (S.D. Cal. 1954) ("This is Nature's Most restful posture"). *See also* 37 C.F.R. § 202.1(a) (1993) ("short phrases such as names, title and slogans" are not subject to copyright).

In the absence of a dispositive ruling on this question, there was nothing for PepsiCo to cross-appeal. PepsiCo did, however, urge in its brief to the court of appeals that it should decide the copyrightability issue as a matter of judicial discretion and economy.

As this Court made clear in *Feist*, originality is a constitutional requirement. *Feist*, 499 U.S. at 346. The question whether an allegedly infringed portion of a work is "original" is, therefore, a fundamental issue properly addressed at any stage of the proceedings. The determination whether allegedly copied material is protectable under copyright presents a question of law that the Fourth Circuit was free to decide notwithstanding the district court's choice not to do so. *See Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 911 n.8 (2d Cir. 1980); *Eden Toys, Inc. v. Florelee Undergarment Co., Inc.*, 697 F.2d 27, 35 (2d Cir. 1982); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 603 F. Supp. 432, 433-34 (E.D.N.Y.), *aff'd*, 773 F.2d 411 (2d Cir. 1985). Even if the district court had decided this question, the Fourth Circuit would have been obliged to revisit the issue *de novo*. The "clearly erroneous" standard governing review of questions of fact would have no relevance to the appellate court's examination of the legal question whether the disputed phrase met the constitutional requirement of originality.

CONCLUSION

The Petition for a Writ of Certiorari should be denied because the Fourth Circuit's decision does not conflict with that of any other circuit court, and because the affirmance of the grant of summary judgment to PepsiCo merely represents the application of a well-established legal standard to a particular set of facts. The petition should also be denied because any purported controversy in the federal courts concerning the relationship between striking similarity and access is not appropriately resolved in this case in which the court of appeals upheld the dismissal of the plaintiff's case on independent, separate grounds.

Respectfully submitted,

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